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SUPERIOR COURT OF STATE OF ARIZONA
COUNTY OF YAVAPAI

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| STATE OF ARIZONA,<br><br>Plaintiff,<br>vs.<br>JAMES ARTHUR RAY,<br><br>Defendant. | CASE NO. V1300CR201080049<br><br>Hon. Warren Darrow<br><br>DIVISION PTB<br><br>**DEFENDANT JAMES ARTHUR RAY'S RESPONSE TO THE STATE'S MOTION FOR RECONSIDERATION OF MONETARY SANCTIONS IN CONNECTION WITH MR. RAY'S MOTION TO COMPEL** |

## MEMORANDUM OF POINTS AND AUTHORITIES

## I. INTRODUCTION

The State has fallen far short of the "good cause" required to justify reconsideration of this Court's September 20 sanctions order. *See* Ariz. R. Crim. Proc. 16.1(d) ("Except for good cause, or as otherwise provided by these rules, an issue previously determined by the court ***shall not*** be reconsidered.") (emphasis added). There are no new facts or changed circumstances that support relitigation of an issue decided by the Court nearly four months ago after extensive briefing by both parties, or that rehabilitate a legal position that was never grounded in law.

Indeed, the State does not here challenge the Court's order mandating disclosure.[1] Instead, the State moves for reconsideration of sanctions based on its unexplained assertion that the State "honestly believed *and continues to believe*," in "*good faith*," that the materials at issue are "non-disclosable work product." Motion for Reconsideration at 2:4–8. The State continues to take this position regarding "*any* information relating to the December 2009 meeting," ranging, apparently, from the PowerPoint presentation shown to the expert witnesses at the meeting to the *names* of the participants who attended. *Id.* at 6:17–18; *id.* at 1:23–24. The State further asserts, for the first time at this late date, that the State's failure to provide the requested disclosure rested on its good-faith belief that the materials requested by the Defense were "not covered by 15.1," and therefore cannot be the basis for a sanctions award. Neither of these unfounded positions warrants reconsideration of this Court's ruling.

## II. ARGUMENT

### A. The State's denial of the Defendant's request for disclosure under Rule 15.1 was *always* based on a blanket assertion of work product.

The State rests its Motion for Reconsideration in part on its new and belated assertion that "the State believed . . . that the requested materials were not covered within the parameters of Rule 15.1," and because the "[t]he State anticipated Defendant would move the Court to order disclosure pursuant to Rule 15.1(g)." Motion for Reconsideration at 3:10–16. Sanctions are not

[1] The State's Motion for Reconsideration appears to have been prompted by the recent filing of the Defense's Statement of Costs. As discussed *infra*, the Court's determination of costs is, and must remain, separate from whether the order awarding sanctions was appropriate in the first instance and supported by law—which it was.

warranted, the State apparently argues, because this was merely a "genuine disput[e] over whether material [was] covered under Rule 15.1." *Id.* This late-breaking justification for the State's position is unsupportable. The Defense's request for materials was explicitly based on Rule 15.1; the State's repeated objections were based on a blanket assertion of work product; and the Court's ruling was based on both "Rules 15.1(b)(4) *and* 15.4(a) of the Arizona Rules of Criminal Procedure." Order at 2 (emphasis added).

The history of this dispute confirms that this was *never* a disagreement over the scope of Rule 15.1, or the need for a motion under Rule 15.1(g). Upon learning of the State's undisclosed meeting with medical examiners, the Defense sought discovery of five categories of information: (1) the names of all persons in attendance, whether personally or telephonically, (2) a copy of the Power Point and any other documents or demonstratives presented during the conference, (3) the audio recording of the meeting, (4) any notes taken by any attendants in connection with the conference, and (5) the existence of any *Brady* material that arose in this conference. As the Defense explained in its correspondence with the State and its Motion to Compel, these requests were rooted in the dual concerns that (a) the materials encompassed statements by expert witnesses, and thus disclosure was required under Rule 15.1(b)(4), and that the PowerPoint presentation and facts surrounding the meeting constituted *Brady* material.

The State *never* informed the Defense of a belief that the requested disclosure exceeded the scope of Rule 15.1 and thus required a motion under Rule 15.1(g)—not in the multiple letters exchanged by the parties, not after receiving notice that the Defense intended to file a motion to compel, not in the State's Response to the Motion to Compel, and not at oral argument in this matter. Instead, the State's unequivocal position was that the meeting, and all of the information and materials related to it, were work product. For example, the State's May 26 letter to the Defense stated:

> **"Meetings between the prosecutors, investigators and medical examiners are work product protected by Rule 15.4(b)(1), Arizona Rules of Criminal Procedure; your request with respect to the names of persons involved in such meetings, and notes taken by those in attendance, is denied.** Such meetings have not been recorded. Likewise, the PowerPoint presentation referred to in your letter is work product and will not be disclosed. Any *Brady* material has been disclosed and will continue to be disclosed as it is discovered." Letter from Sheila Polk to Truc Do, May 26, 2010, attached as Exhibit 56 to Declaration of Truc Do, filed June 29, 2010.

Indeed, at oral argument on the motion to compel, the State took the startling position that work product protection is absolute and *can never be waived.* The State's attempt to now recast the dispute as a good-faith difference over the scope of Rule 15.1 is plainly at odds with the record.

Nor does the wording of the Court's September 20 Order provide any basis for concluding that the State believed, in good faith, that disclosure was not required under Rule 15.1. The Court specifically noted that "the State must disclose any and all notes, regardless of the organizational affiliation of the author, summarizing the medical examiners' oral communications at the meeting. Rules 15.1(b)(4) and 15.4(a) of the Arizona Rules of Criminal Procedure; *State v. Reid*, 114 Ariz. 16, 30, 559 P.2d 136, 150 (1976)." To the extent the Court did not discuss in more detail the scope of Rule 15.1, it is because that question was never presented.[2]

**B. The State's asserted "good-faith" belief is inexplicable.**

The heart of the State's Motion for Reconsideration is its insistence that it "honestly believed *and continues to believe*," in "*good faith*," that the materials at issue are "non-disclosable work product." Motion for Reconsideration at 2:4–8 (emphasis added). The State's continued assertion of this work product claim is difficult to understand, and is all the more troubling in light of the information disclosed by the State pursuant to the Court's September 20, 2010 Order.

[2] The State's post hoc argument that the Defense request exceeded the scope of Rule 15.1 highlights precisely why the meet and confer process exists. Had the State represented in timely fashion, the Defense would have discussed the disagreement in good faith and sought the Court's intervention only as necessary. *See generally* Rule 15.7(b) (motion for sanctions appropriate only after moving party has attempted in good faith to resolve the matter with opposing counsel without intervention of the court). The Defense repeatedly asked the State to provide authority for its blanket assertion of work product.

First, it bears repeating, the Defense's discovery request encompassed five categories of information. For two of these categories, participant names and *Brady* material, the State has *never* articulated any case law or other basis for its blanket work product objection. Nor has the State provided authority rebutting, *inter alia*, the Defense's arguments that any possible work product protection was waived by the provision of materials to expert testifying witnesses. And the State does not now challenge this Court's ruling in the Defense's favor or provide authority for doing so. In short, the State adheres to a "good-faith" belief in a legal position that it has never articulated.

Second, the State's previous factual justification for its work product defense has only been further refuted by the now-disclosed information. In its July 23 filing to this Court, the State characterized the December 14 meeting as a "charging decision" meeting, and averred that the PowerPoint presentation shown at the meeting was a summary of the law enforcement investigation that was made "to the prosecutors for a charging decision." Response at 7. The facts now reveal that the PowerPoint was, in fact, a document sent directly to the medical examiners for their consideration *prior to* and during the December 14 meeting. *See, e.g.*, Transcript of Re-Interview of Det. Ross Diskin, 11/17/10, at 7:5–13 ("I had requested that the PowerPoint be emailed to them" so that the medical examiners could "follow along as I was going through the presentation"). This was because one of the meeting's purposes was to present information to the medical examiners to assist them in reaching their conclusions. *See, e.g.*, Diskin Trans., 11/17/10, at 4:9–10, 4:23–28 (DO: "The other purpose was to present information to the Medical Examiners, correct? DISKIN: That's correct." ... DO: But it was your intention to provide them with the information you had collected from your investigation to date, correct? DISKIN: That's correct. DO: And it was your intention that they be able to use that in whatever manner they saw fit to assist them in their investigation, correct? DISKIN: That's correct."); Re-Interview of Dr. Lyon, 1/7/11, at 58:30–58:36 (purpose of meeting was "to discuss cause and

manner of death and possibly come to a consensus regarding the wording of cause and manner of death"). *See also* Motion to Compel at 9.[3]

Furthermore, review of the PowerPoint presentation given to the medical examiners only heightens the concern that it, and the medical examiners' statements at the meeting, constitute *Brady* material. *See* Defendant's Reply in support of Motion to Compel at 3. The presentation consists of 60 slides containing only "facts" provided by witness statements, including many that are blatantly slanted and incomplete. The provision of these materials to the medical examiners, who determined the causes of death in this case and are also expert testifying witnesses, combined with their statements that they *relied* on this information in reaching their conclusions regarding the cause of death, bear on the credibility of their conclusions and is favorable information to Mr. Ray. *See, e.g.*, Lyon Re-Interview at 1:01:39-1:05:10 (the PowerPoint was the main source of his information regarding previous sweat lodge incidents, which he considered relevant; he asked questions at the meeting in order to "get all of the facts," and all of his questions were answered by the presentation).

On this record, it is difficult to understand how the State's characterization of *any* information related to the December meeting as "nondisclosable work product" could ever have been made in good faith. And absent a legal *or* factual argument, it is difficult to see the basis for the State's *continued* assertion of such a belief.

**C. An award of monetary sanctions was appropriate.**

The State's repeated attempts to conceal and recast the December meeting with the medical examiners are, the Defense respectfully submits, squarely within the realm of Rule 15.7 sanctions. These sanctions are a critical safeguard against discovery violations, *State v. Tucker*, 157 Ariz. 433, 441 (1988), and ensure that parties do not lose sight of the "search for truth" essential to the criminal justice system. *See State v. Roque*, 213 Ariz. 193, 220 (2006). Moreover, the Court's decision to award monetary sanctions, as opposed to other penalties, was

[3] Moreover, the State has provided the PowerPoint presentation to its three new experts (Rick Ross, Steve Pace, Dr. Matthew Dickson) as reliance material for their testimony. *See* Letter from Sheila Polk regarding scope of testimony, 1/7/11.

entirely appropriate. The Committee Comments to the 2003 Amendments to Rule 15.7 specifically state a desire to strengthen the available sanctions; the former "sanctions" of ordering disclosure and a continuance did not provide sufficient disincentives to rule-breaking.

If the Court has concerns with the *amount* of the costs submitted by the Defense in its Statement of Costs, the Defense will readily provide any further documentation the Court requires. Furthermore, although the Defense strived to minimize associated costs and, in fact, wrote off many associated costs altogether, the Defense is ready and willing to work with the Court to determine what constitutes a reasonable award. But the considerable *amount* of the expense the Defense incurred in prosecuting the motion to compel and conducting re-interviews must not be confused with the underlying legal reasons the sanctions were granted. Those reasons are as valid today as they were when the Court first ruled four months ago.

## III. CONCLUSION

The State's conduct in connection with the December 2009 meeting with medical examiners already has marred the integrity of the proceedings against Mr. Ray. The Court should adhere to its cautious and correct ruling awarding sanctions. The State's Motion for Reconsideration should be denied.

DATED: January 28th, 2011

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